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IN THE

Supreme Court of the United States

October Term, 1966

No. 824

WILLIE WILLIAMS and SAM MARTIN,

Petitioners,

—v.—

JOSEPH N. SHAFFER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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JOSEPH N. SHAFFER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Georgia entered in the above entitled cases June 23, 1966, *infra*, p. 7a, rehearing denied July 7, 1966, *infra*, p. 8a. A single petition is filed in the two cases pursuant to this Court's Rule 23(5), since the cases were consolidated for decision by the court below.

Citations to Opinions Below

The opinion of the Supreme Court of Georgia is reported at 149 S.E. 2d 668 (1966), and is printed in the Appendix hereto, *infra*, pp. 3a-6a. The Superior Court of Fulton County, Georgia, did not deliver an opinion in the cases. Its orders are printed in the Appendix hereto, *infra*, pp. 1a-2a.

Jurisdiction

The judgments of the Supreme Court of Georgia were entered June 23, 1966, *infra*, p. 7a. Motions for rehearing were denied by the Supreme Court of Georgia July 7, 1966, *infra*, p. 8a. The time for filing this petition for writ of certiorari was extended to and including December 3, 1966 by an order signed by Mr. Justice Black on September 28, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

Petitioners, both indigent Negroes, formerly residing in low rental apartments in Atlanta, Georgia, were summarily evicted pursuant to procedures established by Georgia Code Title 61, §§301-305. Because the statute requires the posting of a bond with substantial security as a pre-condition to making any defense, they were denied a hearing on defenses they attempted to assert:

1. Under these circumstances were petitioners denied rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution?

2. Are their cases moot because of the evictions, in view of the facts that: (a) the evictions were able to be carried out solely because of the unconstitutional procedure; (b) their rights will be affected by any decision upon the constitutionality of the statutes; and (c) there is a substantial public interest in the continued unconstitutional operation of the statutes?

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the summary eviction procedure provided by the statutes of the State of Georgia:

Georgia Code Annotated, Vol. 19
Title 61

61-301. Demand for possession; proceedings on tenant's refusal to deliver.—In all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and in all cases where lands or tenements shall be held and occupied by any tenant at will or sufferance, whether under contract of rent or not, and the owner of the lands or tenements shall desire possession of the same, such owner may, by himself, his agent, attorney in fact or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and if the tenant shall refuse or omit to deliver possession when so demanded, the owner, his agent or attorney at law or attorney in fact may go before the judge of the superior court or any justice of the peace and make oath to the facts. (p. 106)

61-302. Warrant for tenant's removal.—When the affidavit provided for in the preceding section shall be made, the officer before whom it was made shall grant and issue a warrant or process directed to the sheriff, or his deputy, or any lawful constable of the county where the land lies, commanding and requiring him to deliver to the owner or his representative full and

quiet possession of the lands or tenements mentioned in the affidavit, removing the tenant, with his property found thereon, away from the premises. (p. 124)

61-303. Arrest of proceedings by tenant; counter-affidavit and bond.—The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case. (pp. 124-125)

61-304. Issue tried in superior court.—If the counter-affidavit and bond provided in the preceding section shall be made and delivered to the sheriff or deputy sheriff or constable, the tenant shall not be removed; but the officer shall return the proceedings to the next superior court of the county where the land lies, and the fact in issue shall be there tried by a jury. (p. 129)

61-305. Double rent and writ of possession, when.—If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is

shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises. (p. 135)

Statement

Petitioner Willie Williams was renting several rooms from defendant Joseph Shaffer at 424 Markham Street in Atlanta, Georgia (R-W 6).[1] Petitioner Sam Martin was renting a single room from the same landlord at 445 Miller Alley S.W. in Atlanta, Georgia (R-M 6).[2]

Acting under procedures established by Georgia Code Title 61, §§ 301-302, defendant landlord on or about February 22, 1966 procured dispossessory warrants from a judge of the Fulton County Superior Court directed to the county sheriff to dispossess each petitioner (R-W 6, 14; R-M 6, 14).

Following notification of the existence of the dispossessory warrant, each petitioner attempted to arrest the eviction proceedings and prevent his removal from the premises under procedure established by Georgia Code Title 61, §§ 303-304. Each sought to file an appropriate counter-affidavit in the Superior Court of Fulton County raising defenses together with an affidavit that he was unable to post

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[1] There were originally two cases, but they were consolidated for decision by the Supreme Court of Georgia since the relevant facts and issues are identical. The citation "R-W" is to the record in Willie Williams v. Joseph N. Shaffer, and the citation "R-M" is to the record in Sam Martin v. Joseph N. Shaffer.

[2] See footnote 1.

security as required by that statute in such cases due to his poverty (R-W 5-24; R-M 5-23).

The nature of the defenses which each petitioner sought to raise to the eviction proceeding included (1) that the rent claimed was not due (R-W 9; R-M 9); (2) that he was willing and able to pay all further rents as they became due (R-W 9; R-M 8-9); (3) pursuant to an agreement between himself and the defendant landlord, petitioner had made certain repairs on the premises for which materials and labor the defendant landlord was to credit against rents due or to become due (R-W 7-8; R-M 7-8); (4) defendant landlord had failed to give the petitioner the notice required by law of his intention to terminate the tenancy (R-W 7; R-M 7); (5) two weeks previously defendant landlord procured a dispossessory warrant for the same premises, and upon subsequent appearance in the Fulton County Civil Court, defendant landlord voluntarily announced that he had received his rent and that he accepted petitioner as a tenant in the premises (R-W 6-7; R-M 6-7); (6) that the defendant landlord was abusing the process of the Court to avoid making the necessary repairs required of him by law on the premises in issue, and to avoid compensating petitioner for making repairs (R-W 8; R-M 8).

The security required by Title 61, § 303 is substantial. Georgia Code Title 61, § 305 provides that if the issue is determined against the tenant, judgment shall go against him for double the rent due for the period during which he was in possession after the initial attempt at eviction, and Title 61, § 304 provides that the issue shall be tried in Superior Court before a jury—a procedure which may require several months (R-W 17-18; R-M 18-19). The Marshal of the Civil Court of Fulton County, who is charged with the duty of accepting the bond and staying

the eviction proceedings by Title 61, § 304, stated that he would accept only surety on bonds furnished by a licensed corporate surety, or an individual surety who owns real property located in Fulton County sufficient in value to support the bond involved (R-W 18; R-M 17). The several insurance agencies contacted, which were known to post dispossessory bonds for tenants, advised that it would be necessary for each petitioner to put up a cash collateral for double the rent for about six months, as well as pay an unrecoverable bond premium (R-W 16; R-M 17).

The circumstances of petitioner Willie William's poverty, which supported his affidavit of inability to post the security, was that he was presently unemployed; when last employed as a handy man he earned $50 a week; the rent in issue was $17 a week; he had a wife and three children who lived with him at the premises in issue; he had to spend about $9 a week for wood and coal to heat the premises (R-W 8-9). The circumstances of petitioner Sam Martin's poverty, which supported his affidavit of inability to post the security, was that he earned $54 a week in construction work; the rent in issue was $6 a week; he had to spend about $3 a week for coal to heat the premises in issue; the premises were in such dilapidated condition that he had to make continuous expenditures to keep them habitable (R-M 15-16). Both petitioners were without friends or relatives able to post security in the form of real property located in Fulton County for the bond required (R-W 10; R-M 11).

How the Federal Questions Were Raised and Decided Below

In their petitions to the Superior Court of Fulton County attempting to arrest the eviction proceedings, each petitioner sought vacation of the dispossessory warrants of February 22, 1966, and injunctions against the defendant-landlord and the sheriff of Fulton County restraining them from executing said dispossessory warrants, on the ground that Georgia Code Title 61, § 303 violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, in that said statute invidiously barred petitioners from obtaining hearings in the courts of the State of Georgia of any defenses which they might have to said evictions solely because of their poverty (R-W 9-12; R-M 9-12). Each petitioner sought to be allowed to pay into the registry of the Superior Court any rents due or to become due to the defendant-landlord during the pendency of the action, requested that the defendant-landlord be enjoined from evicting petitioners until the disposition of the case, and sought such other and further relief as might appear just during the course of the proceedings (R-W 12; R-M 12).

After oral argument in the Superior Court of Fulton County, both the petition of Willie Williams and the petition of Sam Martin for injunctions were denied, and defendant-landlord Joe Shaffer's motions to dismiss were granted, in orders of March 2, 1966 (R-W 25; R-M 24).

Each petitioner appealed to the Supreme Court of Georgia from the above orders and judgments (R-W 1; R-M 1).[3] In the Enumeration of Errors, each petitioner

[3] Following the denial of the injunction in the state court, both petitioners also filed a consolidated suit in the United States District Court

again asserted that Georgia Code Title 61, § 303, requiring the posting of a bond as a condition precedent to the making of a defense by a tenant in a dispossessory proceeding, constituted a violation of the Fourteenth Amendment to the Constitution of the United States (R-W 28-29; R-M 27-28). The Attorney General of Georgia filed a brief in the Supreme Court on behalf of the State of Georgia, and the Atlanta Real Estate Board filed an *amicus curiae* brief.

The Supreme Court of Georgia, in a single consolidated decision of the two cases on June 23, 1966, dismissed the appeals on the ground that since the court below had refused to stay the dispossessory proceedings pending appeal, the sheriff of Fulton County had, in fact, evicted the petitioners from their respective premises on March 5, 1966, thereby rendering the cases moot, since all that was sought to be enjoined had been done. The Court also refused to consider the cases as seeking declaratory judgments since there were no circumstances alleged which showed that an adjudication of petitioners' rights was necessary in order to relieve them from the risk of taking

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for the Northern District of Georgia, Atlanta Division (*Willie Williams and Sam Martin* v. *T. Ralph Grimes and Joseph N. Shaffer*, Civil Action No. 10,025), asking for a restraining order against the Sheriff of Fulton County and defendant landlord from evicting petitioners under the state proceedings, a permanent injunction against the enforcement of Title 61, § 303, and a declaratory judgment rendering such section null and void. A three-judge court was impaneled. The State of Georgia through the Attorney-General intervened as a matter of right, and the Atlanta Real Estate Board also intervened as *amicus curiae*. The district court denied relief in an opinion dated April 18, 1966, on the ground that a state proceeding was still in progress and that there was a possibility of obtaining relief therein.

Subsequent to the denial of relief by the Supreme Court of Georgia, petitioners filed a motion for reconsideration in the district court. This was denied in an order dated August 23, 1966 and the original opinion was re-adopted.

any future action incident to their rights, which action without direction would jeopardize their interests (R-W 33-41; R-S 32-40) (R-W 33-41; R-M 32-40). The Supreme Court of Georgia did not make any explicit determination concerning petitioners' Constitutional claims.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari To Consider Petitioners' Contentions That Georgia Code § 61-303, Which Barred Them From A Hearing Because Of Their Poverty, Is In Conflict With Principles Declared By This Court And Is Unconstitutional Under The Equal Protection And Due Process Clauses Of The Fourteenth Amendment.

The decision of the court below is in conflict with decisions of this Court as exemplified by *Hovey* v. *Elliott*, 167 U.S. 409 and *Griffin* v. *Illinois*, 351 U.S. 12. Sections 303-304 of Title 61 of the Georgia Code Annotated require that any defendant in a summary ejectment action post a bond with good security as a precondition to making any defense. An indigent defendant may be divested summarily of valuable rights solely because of his poverty without regard to the merits. Petitioners submit that this requirement violates the due process and equal protection clauses of the Fourteenth Amendment when applied to an indigent tenant-defendant.

This Court has long made clear that a state government violates due process of law by subjecting defendants in civil or criminal proceedings to judicial processes which deny such fundamental rights as to notice and opportunity to appear and defend. *Hovey* v. *Elliott*, 167 U.S. 409, decided

in 1897, held that due process was denied by a trial court which struck a defendant's answer and refused to permit him to try his case on the merits because he had disobeyed the court's order to pay into its registry money which was the subject matter of the controversy. The Court reasoned that the denial of all right to defend would convert the court into an instrument of wrong and oppression.

In *Windsor* v. *McVeigh*, 93 U.S. 274, although notice was given in a proceeding to confiscate property under a Civil War statute, petitioner's answer was stricken and judgment was summarily rendered against him. Mr. Justice Field, in a decision reversing the lower court, described why the due process clause requires that a defendant be afforded an opportunity to appear and defend:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not

be rendered. A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and, when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard. 93 U.S. at 277, 278.

Thus, just as the exercise of such basic rights as free speech,[4] the right to travel from one state to another,[5] the right to vote[6] or the right to counsel[7] cannot be conditioned on affluence, neither may the right to defend in a civil action before valuable property rights are taken away.

Similarly, this Court has held that to condition on one's affluence the undertaking of certain proceedings violates the equal protection clause. The Court has struck down fee limitations on the right of criminal defendants to take an appeal, *Burns* v. *Ohio*, 360 U.S. 252, or to file a petition for a writ of habeas corpus, *Smith* v. *Bennett*, 365 U.S. 708. To require an indigent to pay such fees was invalid, since "[t]here is no rational basis for assuming that indigent's motions for leave to appeal will be less meritorious than those of other defendants," *Burns* v. *Ohio*, *supra*, at 257, 258.[8] Nor can the state, acting through penal institutions, impose rules which make arbitrary distinctions between

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[4] *Murdock* v. *Pennsylvania*, 319 U.S. 105.

[5] *Edwards* v. *California*, 314 U.S. 160.

[6] *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663.

[7] *Gideon* v. *Wainwright*, 372 U.S. 335.

[8] In contrast, the federal in forma pauperis statute, 28 U.S.C. § 1915, permits a federal court to deny leave to appeal in forma pauperis but only after a finding, reviewable on appeal, that the appeal is without merit and not in good faith.

those who can and who cannot appeal. See *Cochran* v. *Kansas*, 316 U.S. 255; *Dowd* v. *Cook*, 340 U.S. 206.[9]

In determining both whether the Georgia statute violates due process and whether it denies equal protection of the laws, the determining factor is whether there is any rational or legitimate basis for imposing a fee requirement that distinguishes between tenant-defendants with and without means to furnish bonds before having their defenses heard. Petitioners contend that there is no such justification, but that on the contrary the state has created an irrational distinction between the affluent and the indigent tenant, raising, in effect, an irrebuttable presumption that the defenses of the indigent tenant are without merit.[10] However, since there is no rational basis for presuming that the defense of the indigent tenant is less meritorious than that of affluent tenant-defendants, the state has created an "invidious discrimination" against the poor by making affluence a standard of measurement as to which

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[9] A distinction has been drawn between a state fee requirement on taking an appeal, as applied to an indigent, and a requirement of posting a bond on appeal as security. *National Union of Marine Cooks* v. *Arnold*, 348 U.S. 37. But the Court in *Arnold* expressly distinguished between a bond requirement on appeal from such a requirement as a precondition to making a defense at trial, on the ground that at the appellate stage the appellant has already had his day in court. *Hovey* v. *Elliott*, *supra*, is discussed at length both by the majority which distinguishes it, and in a dissent by Justices Black and Douglas who argue that *Hovey* should apply even to an appeal, once the state has undertaken to provide a system of appeals.

[10] Not only will the indigent tenant be unable to file his affidavit of defense in the dispossessory warrant proceedings, but Georgia cases consistently deny tenant-plaintiffs injunctive relief against evictions, on the ground that, even though the tenant may be indigent and unable to furnish bond, the legal remedy is adequate. *Flynn* v. *Merck*, —— Ga. ——, 49 S.E.2d 892 (1948); *Napier* v. *Varner*, 149 Ga. 586, 101 S.E.2d 29; *DeFlorio* v. *Tarvin*, 193 Ga. 760, 20 S.E.2d 29; cf. *Worthy* v. *Tate*, 44 Ga. 152.

tenant defenses should or should not be heard. Cf. *Harper* v. *Virginia State Board of Elections, supra.*

In *Griffin* v. *Illinois*, 351 U.S. 12, where the Court struck down as such an invidious discrimination an Illinois appellate procedure requiring indigent criminal defendants to pay for transcripts of proceedings in order to gain review of non-constitutional errors, it was said:

> *Surely no one would contend that* either a State or the Federal Government could constitutionally provide that *defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court.* Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor.
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> • • • • •
>
> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. 351 U.S. at 17-18 (emphasis added).

And just as the Court concluded in *Griffin* that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," (351 U.S. at 19), obviously, here, equal justice will be denied if the question whether a man will get a trial at all is answered by the amount of money he has.

Indeed, it is difficult to conjecture what might be a valid reason for closing off the opportunity to defend one's rights if the defendant was destitute. Unlike requirements

for the payment of fees by *plaintiffs*[11] the bond requirement here, placed upon *defendants*, does not serve to limit the filing of frivolous claims.[12]

Thus, the conclusion is inescapable that just as the Court held in *Griffin* that the constitutional prohibitions against denials of equal protection of the law and due process of law bar the conditioning of access to the criminal process on affluence, so they similarly must bar the imposition of such a condition on an indigent in a civil action before he may present his defenses to his being divested of valuable property rights.

[11] The giving of a bond by a *plaintiff* is a frequent limitation on the right to the use of courts or for extraordinary relief in the federal and state systems. See 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 407 (injunction in labor disputes); 28 U.S.C. § 1446 (removal of cases); F.R.C.P. 65 (temporary restraining order); Georgia Code § 39-301 and 302 (forthcoming bonds); Georgia Code 88-702 and 8-801 (claim bond in attachment); Georgia Code §-37-1403 (ne exeat). However, no similar provisions have been found requiring defendants to furnish bonds before filing a *defense* after plaintiffs have selected the forum.

[12] Georgia has an effective device for limiting frivolous defenses. The defense must be made by affidavit. Title 61, Georgia Code Ann. § 61-303. Title 26, Ga. Code Ann., §§ 26-4001, 26-4002, would subject the perjuring affiant to criminal penalties. See *Sistrunk* v. *State of Georgia*, 18 Ga. App. 42, 88 S.E. 796 (syllabus: conviction for perjury upon a false affidavit made in dispossessory proceedings, affirmed).

Certiorari Should Be Granted to Decide the Questions Presented Since the Court Below Erred in Its Determination That Petitioners' Cases Have Become Moot.

The court below ruled that since petitioners had been evicted, "the suits to enjoin their removal from the rented premises (have) become moot." (Appendix, p. 6a.) It also refused to grant petitioners' prayers for declaratory judgment adopting language saying "[w]here, as here, the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' right is necessary in order to relieve [them] . . . from the risk of taking any future undirected action . . . the petition fails to state a cause of action for declaratory judgment." (Appendix, p. 6a.)

Whether a case in which a federal constitutional claim has been asserted has become moot is a federal question to be decided by this Court in resolving its jurisdiction; hence, the lower court's finding of mootness is not binding. *Love* v. *Griffith*, 266 U.S. 32; *Liner* v. *Jafco*, 375 U.S. 301, 304, 305, Cf. *Ward* v. *Love County*, 253 U.S. 17, 22.

The decision below, if allowed to stand, would conclude a series of attempts by petitioners to obtain their constitutional right to be heard before they are divested of valuable property rights. In the eviction proceeding they were met by the challenged bond requirement, which constituted an absolute bar. They then filed a petition in equity to challenge the bond statute. However, after their petition was denied they were evicted by default because they could not present their defenses. The Supreme Court of Georgia held that this action was moot because of that eviction. In this way the wholly anomalous result was reached that the state could use an unconstitutional and

hence void proceeding to prevent petitioners from challenging that very proceeding. Thus, if petitioners' cases are now moot, it is difficult to imagine how the constitutionality of the statute can be ever decided by this Court or any of the lower Georgia courts.[12a] Indeed, the statute would be virtually immune from constitutional challenge.[13]

Decisions of this Court have made clear that where acts sought to be enjoined have been performed by coercion (e.g. by forcible eviction), the case is not moot because the consequences of the conduct may be set aside by the subsequent issuance of an injunction. *Porter* v. *Lee*, 328 U.S. 246; *Texas & N. O. R. Co.* v. *Northside Belt R. Co.*, 276 U.S. 475, 479.

In *Porter* v. *Lee*, the Federal Price Administrator brought actions in a federal district court under the Emergency Price Control Act to restrain an eviction brought by respondent in state court for alleged non-payment of rent. The Administrator's complaints were dismissed and pending appeal the tenant vacated his apartment. The Circuit Court of Appeals held that the cases had become moot. This Court reversed the mootness ruling, reasoning that "(t)he mere fact that the (tenant) . . . in order to comply with the writ of possession vacated the apartment was not enough to end the controversy." (328 U.S. at 251.) Since the respondent there had completed the acts sought to be enjoined (the eviction) after having notice of the injunction suit the Court held that there was mandatory injunctive power to restore the status quo, citing, *Texas & N. O. R. Co.*, *supra*.

[12a] The summary eviction statute provides that eviction will take place three days after a dispossessory warrant is obtained unless within that period the tenant files a counter affidavit and bond pursuant to the challenged statute. Tit. 61, § 306, Ga. Code Ann. Sec, R-M 14.

[13] The petitioners were also unsuccessful in an attempt to obtain a federal court injunction against the evictions and the operation of the statute. Williams, *et al.* v. *Grimes*, C.A. No. 10,025 (Slip Op. 1166, M.D. Ga.), see fn. 3, *supra*.

Petitioners here brought both state and federal injunctive suits to stay their evictions. Certainly, *Porter* would bar an assertion that their cases are now moot because they were unable to stay their evictions, because of Georgia law, before their cases could reach the appellate court for decision. Obviously, the Georgia courts have similar powers to restore petitioners to the status quo.[14]

In addition to the above, there are other principles by which this Court may find that there is no mootness bar to its reaching the important issues presented here. This Court has frequently decided cases on their merits, even though the central dispute between parties to the litigation has ended.[15] Thus, in *United States* v. *Trans-Missouri*

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[14] Although no Georgia cases can be found which specifically grant a wrongfully evicted tenant the right to be readmitted, petitioners' prayers that the dispossessory warrants be vacated, and for such other and further relief as is just could be read by the Georgia courts as a request for readmission in the event of eviction. In *Lehmann* v. *West Seventy-Sixth St. Man. Corp.*, 67 N.Y.S. 2d 91 (Sup. Ct. N.Y.C. 1946), a New York Court granted the tenant repossession of the apartment from which she had been evicted, saying: "With the setting aside of the warrant of dispossess, the tenant became entitled to possession of the premises from which she had been removed by virtue of the warrant." (Id. p. 92.) And, recent New York cases have granted tenants the right to repossession where the wrongfulness of their evictions arose from non-service of process. *Albany* v. *White*, 46 Misc. 2d 915, 261 Misc. Supp. 2d 361 (1965); *Marluted Realty Corp.* v. *Decker*, 260 N.Y. Supp. 2d 988. Certainly, if Georgia courts have equitable power to grant a landlord an injunction against waste by the tenant during his possession, *Jones* v. *Gammon*, 123 Ga. 47, 50 S.E. 982, or to prevent a landlord from interfering with the tenant's possession during the tenancy, *Shoals Power Co.* v. *Fortson*, 138 Ga. 460, 75 S.E. 606, they have power to readmit a tenant to possession where he proves that the dispossessory warrant was unlawfully executed.

[15] The purpose of the litigation is often determinative. See, generally, Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946); Note, *Cases Moot On Appeal: A Limit On The Judicial Power*, 103 U. Pa. L. Rev. 772 (1955). Here, the prayer for relief indicates a far broader purpose than mere injunction of the eviction proceedings. Among the claims for relief were: (1) that § 61-303 be declared unconstitutional; (2) that an order be issued to vacate the ex parte order in the nature of a dispossessory warrant, on the basis of allegations of

Freight Ass'n., 166 U.S. 290, 308, and *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 491, 515, the Court decided appeals on the ground that the cases were vested with a substantial public interest which was not extinguished by disappearance of the central contest between the parties.

In *Trans-Missouri Freight Ass'n., supra,* an anti-trust case, the United States sought both to enjoin an association of railroads from alleged violations of the Sherman Act and to dissolve the association. Pending appeal, the association voluntarily dissolved, but the Court held that the case had not become moot, stressing the public nature of the rights being asserted (166 U.S. at 308, 310):

> Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.

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fact and exhibits attached to the petition for injunction; (3) that a rule nisi issue to the Sheriff of Fulton County restraining him from executing the dispossessory warrant; (4) that petitioner(s) have such other and further relief as is meet and just in the premises (R-W 10, 11, 12; R-M 11, 12).

And, in *Southern Pacific Terminal Co., supra,* an appeal by a carrier from an order of the Interstate Commerce Commission barring the grant of certain privileges to a shipper, the Court held that there was a continuing public interest in the legality of certain kinds of I.C.C. orders. Thus, even though the order expired by its own terms pending appeal and could not be affected by the Court judgment, the Court decided the case on the merits:

> In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government and at another time the carriers, have their rights determined by the Commission without a chance of redress. (219 U.S. at p. 515.)

In determining the issue of whether an appeal has become moot where the central controversy has ended, the determining factor is whether there is a likelihood of continuation of the conduct sought to be enjoined. In *Trans-Missouri Freight Ass'n., supra,* it appeared that members of the voluntarily dissolved association of defendants would reform another association. And, in *Southern Pacific Terminal Co.* the continuing public interest in the kinds of orders the I.C.C. could lawfully issue was clear. Similarly, where defendants assert that conduct voluntarily ceased was not illegal, there is a likelihood that it will be resumed and this Court has often held such cases are not moot. *Walling* v. *Helmerich & Payne, Inc.,* 323 U.S. 37,

42, 43; *Goshen Mfg. Co.* v. *Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 207, 208.

It is certain that without a determination of the constitutionality of § 61-303, the statute will continue to foreclose untold numbers of indigent tenant-defendants from presenting meritorious defenses to summary ejectment claims. The Marshal of the Civil Court of Fulton County, Georgia stated (Affidavit, R-W 17; R-M 18) that in Fulton County alone, in recent months, approximately 1,400 dispossessory warrants per month were issued, and that defensive pleadings were filed in less than one per cent (1%) of the cases. The Attorney General of the State of Georgia argued in the brief filed below for the State of Georgia, that § 61-303 was a reasonable measure by which Georgia could protect the property rights of owners of rental property and did not violate the Fourteenth Amendment.

Because of the seriousness and importance of the questions presented, it is imperative that this Court review the decision below and resolve these issues.

The Question of the Right of an Indigent Tenant to Remain in Possession and Defend Against Eviction Without Posting Substantial Security Required By a State Statute Is of General Importance.

This case raises an important constitutional issue in the developing field of the law of poverty—and in a particularly crucial area of that field, landlord-tenant law. The ease of the obtaining of a summary eviction order by the landlord simply by filing an affidavit, combined with the impossibility of a poor tenant defending against it because he cannot post security, permits evictions to occur almost casually. These evictions may be unwarranted and arbitrary, and may result only from inability of the tenant

to post a security so large in relation to the monthly rent that it bears no relation to the tenant's ability to meet his monthly obligations as they become due.

To a tenant who is poor, eviction raises in the most extreme form possible the problem of security in housing. It is important to the development of sound family life that the family be able to remain in one place for substantial periods of time—to develop stable relationships with the neighbors, the schools, etc. Family disruption has long been known to be a crucial agent in maintaining the cycle of poverty. There is not only a social disruption cost, but an economic cost in moving which a poor family has particular difficulty in bearing.[16]

Within the confines of one's income, housing which is voluntarily chosen by an individual family will probably be more suitable to its particular needs than housing not so chosen. No matter how inadequate the housing in which poor families reside, their chances of finding equal or better housing upon eviction are rather slim—as the experience with urban renewal programs in city after city has demonstrated. When a poor person is also a Negro or other minority group member, as are the petitioners here, a housing market in which opportunities are already inadequate because of economic factors becomes much more severely circumscribed through the operation of prejudice.[17]

The existence of summary eviction procedures in which there is a substantial economic obstacle preventing a tenant

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[16] Alvin L. Schorr, *Slums and Social Insecurity* (U.S. Government Printing Office, 1963), pp. 68-73, 86; Carl Schier, "Protecting the Interests of the Indigent Tenant: Two Approaches," 54 *California Law Review* 670 (1966).

[17] Schorr, *op. cit.*, pp. 61-68, 81-87, 96-97, 98-120; Millspaugh, "Problems and Opportunities of Relocation," 26 *Law and Contemporary Problems*, 6, 20-24 (1961).

from contesting eviction, places an enormous amount of arbitrary power in the hands of the landlord which he exercises in collaboration with the State. The existence of detailed housing codes in many cities demonstrates the need to prevent non-resident landlords from allowing the housing in which poor people reside to deteriorate.[18] Such codes may be effective in their intended purpose of securing adequate housing to the poor, only to the extent that those who are injured by their violation complain to appropriate authorities about such violations. However, where a tenant can be easily evicted by a landlord in a summary proceeding in retaliation for such a complaint, it is clear that many tenants will be intimidated into suffering quietly.[19]

Several other states have summary eviction statutes similar to the one in issue which on their face impose a substantial security requirement for possible damages *in advance* on a tenant before permitting him to remain in possession to defend against eviction. These include:

(1) *Arkansas.* Arkansas Statutes Annotated (1947), Title 34, §1510; (2) *California.* California Code of Civil Procedure, § 1166a; (3) *Indiana.* Burns Indiana Statutes Annotated (1933), §§ 3-1304 through 3-1306; (4) *Mississippi.* Mississippi Code Annotated (1942), Title 7, § 957; (5) *Texas.* Texas Rules of Civil Procedure (1955), Rule 740; (6) *Virginia.* Virginia Code Annotated (1950), Title 55, § 242; (7) *Washington.* Revised Code of Washington

[18] More than 650 cities have adopted housing codes since 1954. Note, "The Enforcement of Municipal Housing Codes," 78 *Harvard Law Review* 801, 803 (1965); Schorr, *op. cit.*, pp. 87-96.

[19] Patricia M. Wald, *Law and Poverty: 1965*, Report to the National Conference on Law and Poverty sponsored by the Attorney-General and the Office of Economic Opportunity of the United States (Washington, D. C.: 1965), p. 15; Robert S. Schoshinski, "Remedies of the Indigent Tenant: Proposal for Change," 54 *Georgetown Law Journal* 519, 541 (1966).

(1961), § 59.12.100; (8) *West Virginia.* West Virginia Code (1961), § 3672.[20]

The issue of the potential denial of the Constitutionally required equal protection of the laws to a tenant who is poor and cannot post substantial security to prevent eviction pending adjudication of the merits may therefore be raised by all of these statutes.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[20] It should be noted that while the general procedural laws of many states provide that bonds for court costs may be waived in the case of indigency, as does Georgia (Title 24, § 3413), the above cited bond provisions are specific requirements of the landlord-tenant sections of the respective state statutes apparently intended to secure the landlord's right to rent, rather than the payment of court costs to the state. With this premise, and without considering the possible Constitutional defect of such a statutory requirement, a State court might conclude that it would not make sense to waive the tenant's security requirement on the ground of the tenant's indigency—as the Georgia courts have held—even when there is a general procedural provision waiving bonds for court costs.

APPENDIX

Order

(March 2, 1966)

FULTON COUNTY SUPERIOR COURT (GEORGIA)

WILLIE WILLIAMS

VS

JOSEPH N. SHAFFER

The petition in the above case having been presented to the Court for an ex parte interlocutory injunction, and defendant being present, and objecting to same, and defendant having made a motion to dismiss the said petition, and after hearing argument thereon:

IT IS ORDERED, that the ex parte interlocutory injunction be denied, and further ordered that the defendant's motion to dismiss be sustained, and the petition in the above case is dismissed.

This 2nd day of March 1966.

/s/ LUTHER ABRUSO
Judge, Superior Court, A.J.C.
MINUTES 389, PAGE 273

Filed in office this the
2 day of Mar., 1966
W. M. CALLAWAY
Deputy Clerk

Order

(March 2, 1966)

FULTON COUNTY SUPERIOR COURT (GEORGIA)

SAM MARTIN

VS

JOSEPH N. SHAFFER

The petition in the above case having been presented to the Court for an ex parte interlocutory injunction, and defendant being present, and objecting to same, and defendant having made a motion to dismiss the said petition, and after hearing argument thereon:

IT IS ORDERED, that the ex parte interlocutory injunction be denied, and further ordered that the defendant's motion to dismiss be sustained, and the petition in the above case is dismissed.

This 2nd day of March 1966.

/s/ LUTHER ABBUSO
Judge, Superior Court, A.J.C.
MINUTES 389, PAGE 273

Filed in office this the
2 day of Mar., 1966
RUBY H. WARD
Deputy Clerk

Opinion

(Decided: June 23, 1966)

SUPREME COURT OF GEORGIA

23559. WILLIAMS v. SHAFFER

23560. MARTIN v. SHAFFER

QUILLIAN, Justice. Willie Williams and Sam Martin instituted separate actions against their landlord Joseph N. Shaffer. These cases are in all material aspects alike. In each case, brought through the same counsel, the injunction is sought to prevent the plaintiff's eviction in a dispossessory warrant proceeding on the sole grounds that "annotated Code section 61-303" is unconstitutional in that it requires the tenant in such an action to file a bond, as a condition to entering a counter affidavit. The trial judge upon oral motion struck the petition in each case.

The constitutional attack on the statute is couched in the following language: "petitioner avers that he has no plain and adequate remedy at law, by reason of the facial unconstitutionality of Title 61, Georgia Code Annotated, Section 303. Said statute violates the due process and equal protection of law clauses of the Fourteenth Amendment, United States Constitution, and Article I, paragraphs 3 and 25, Constitution of the State of Georgia of 1945, in that, said statute invidiously bars petitioner from obtaining judicial review in the courts of the State of Georgia of any defenses which he may have to said eviction solely because of his poverty and denies the petitioner equal access to the courts of the State of Georgia. Said statute reads as follows: '61-303. . . . The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not

holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case. . . .' As applied said statute bars petitioner from directly challenging the dispossessory proceedings in the courts of the State of Georgia solely because of his poverty and thereby denied petitioner due process and equal protection of the law in violation of the Fourteenth Amendment, United States Constitution and of Article II, paragraphs 3 and 25, Constitution of the State of Georgia of 1945." The appeals in each case are identical and each reads that the plaintiff "appeals to the Supreme Court of Georgia from the final order and judgment denying plaintiff's prayers for injunctive relief and dismissing his petition on oral motion of the defendant. . . ."

The same enumeration of error and statements are contained in each appellant's brief, which read: "1. Whether Title 61, Georgia Code Annotated, Section 303, requiring the posting of a bond as a condition precedent to making a defense by a tenant in dispossessory proceedings, constitutes a violation of the Fourteenth Amendment, Constitution of the United States, and of Article I, paragraphs 3 and 25, Constitution of the State of Georgia of 1945, where the tenant is impoverished and unable to provide such bond. . . . [Grounds 2 and 3 need not be set out here.] Appellant abandons enumeration of error 2 (a), (b) and

3 and does not insist on them on appeal. Appellant relies entirely upon his challenge to the constitutionality of Section 303 as the grounds for reversal." It is frankly stated in each brief: "The court below, on March 2, 1966, dismissed the petition and denied all relief, without allowing Sheriff Grimes to be named as a party-defendant. Appellant then, on March 2, 1965, filed a notice of appeal. The court below refused to stay the dispossessory proceedings and on March 5, 1966, the Sheriff of Fulton County evicted appellant from the premises."

In an effort to set forth a right to a declaratory judgment each petition alleges: "there is an actual controversy existing between him and the defendant as to petitioner's right to resist said dispossessory proceedings without posting bond and to proceed on a pauper's affidavit." There is no allegation of facts or circumstances which show that an adjudication of the plaintiff's rights is necessary in order to relieve the plaintiff from the risk of taking any future undirected action incident to his rights. Incidental to the prayer for injunction is the following prayer: "that the petitioner have a declaratory judgment declaring, adjudging and decreeing Title 61, Georgia Code Annotated, Section 303, unconstitutional, null and void, upon its face and as applied, under the due process and equal protection clause of the Fourteenth Amendment, United States Constitution, and Article II, paragraphs 3 and 25, Constitution of the State of Georgia of 1945." *Held:*

The Appellate Practice Act of 1965, embodied in Code Ann. § 6-701 (Ga. L. 1965, pp. 18, 20), brings forward the provision contained in previous Codes: "Nothing in this paragraph shall require the appellate court to pass upon questions which are rendered moot." This court held in Clower v. Langley, 153 Ga. 154 (—— SE ——): "Exception is taken to the refusal of an injunction to restrain

the execution of a dispossessory warrant. The brief of counsel for the plaintiff recites that 'since the filing of the bill of exceptions in this case, about ten days ago, plaintiff was dispossessed by the marshall of the municipal court; she is no longer in possession of the premises involved in this action; and therefore the questions involved are moot.' The bill of exceptions is therefore dismissed." As held in Griffin v. Grantham, 220 Ga. 474 (—— SE2d ——): "since all that was sought to be enjoined has been done, the case has become moot and the writ of error must be dismissed." Similar pronouncements are found in Pickett v. Georgia, Fla. &c. R. Co., 214 Ga. 263 (—— SE2d ——); Lorenz v. DeKalb County, 215 Ga. 731 (—— SE2d ——); Espey v. Village of North Atlanta, 218 Ga. 429 (—— SE2d ——); Woods v. State of Ga., 219 Ga. 503 (—— SE2d ——); Trainer v. City of Covington, 220 Ga. 228 (—— SE2d ——). The appellants having been evicted in the present cases, the suits to enjoin their removal from the rented premises become moot.

"'The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.' Rowan v. Herring, 214 Ga. 370, 374 (105 SE2d 29). . . . Where, as here, the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiff's rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardize their interests, the petition fails to state a cause of action for declaratory judgment." So the suits as related to declaratory judgment not only become moot, but under the quoted pronouncement set forth no cause for that relief.

Appeal dismissed. All the Justices concur.

Judgment

(Decided: June 23, 1966)

Supreme Court of Georgia

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Willie Williams v. Joseph Shaffer et al.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the appeal be dismissed. All the Justices concur.

Judgment

(Decided: June 23, 1966)

Supreme Court of Georgia

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Sam Martin v. Joseph Shaffer et al.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the appeal be dismissed. All the Justices concur.

Denial of Rehearing

(Decided: July 7, 1966)

SUPREME COURT OF GEORGIA

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

WILLIE WILLIAMS v. JOSEPH SHAFFER ET AL.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Denial of Rehearing

(Decided: July 7, 1966)

SUPREME COURT OF GEORGIA

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SAM MARTIN v. JOSEPH SHAFFER ET AL.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.